IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

Appeal (Ld) No.51 of 2005
in
Notice of Motion No. 3819 of 2004
in
Suit No.3041 of 2004

Smt.Noor Khatoon Be Rajauddin ..Appellant

vs.

1. Brihanmumbai Municipal Corporation
and anr. ..Respondents

Mr.Girish Desai with Ms.M.V.Thakkar and
Ms.S.V.Thakkar i/b M/s Gordhandas & Fozdar for
appellant.

Mr.V.Mahadik for respondent.

CORAM: A.P.SHAH &
S.J.VAZIFDAR JJ.
15th February,2005

P.C.

1. Appeal admitted. Respondents waive service. By consent appeal is called out and taken up for hearing.

2. This appeal is directed against the order of the learned single Judge declining to grant ad-interim reliefs in a Notice of Motion taken out by the plaintiffs. The motion arises out of a suit for a declaration that the notice dated 11th June, 2004 issued by the respondent no.1 Municipal Corporation under sec.351 of the Mumbai Municipal Corporation Act, 1888 (MMC Act) and order dated

25th August, 2004 passed after hearing the plaintiff is illegal, contrary to law and without jurisdiction. An ad-interim relief by way of injunction was claimed restraining the Municipal Corporation from enforcing the said order dated 25th August, 2004.

3. The suit property is a part of a large property claimed to be owned by a dargah which is registered as a public trust. The dargah/trustees of the dargah had filed a suit bearing L.C.suit No.2297 of 1991 against respondent no.1 Municipal Corporation for a declaration of their title. In Notice of Motion No.2858 of 1993, taken out in the said L.C.Suit No.2297 of 1991, this Court by an order dated 19th July, 1994 directed the parties thereto to maintain status quo. It further directed the parties not to demolish and/or construct on the suit property or make any alterations therein. Thus, the parties were required to maintain statusquo as it existed on 19th July, 1994. It appears that contempt proceedings were initiated by one of the ex-trustees of the dargah alleging breach of this order dated 19th July, 1994 directing the parties to maintain status quo. By an order dated 15th April, 2004 passed in Contempt Petition No.99 of 2003, this Court directed the respondent no.1 Municipal Corporation to undertake

enquiry as to whether any demolition and/or new construction on the suit property or extension of the suit structure standing on the suit property had been affected after 19th July, 1994. The Court further directed that if a finding is reached by the Corporation that any new construction had been made after 19th July, 1994, the respondent no.1 Corporation would be free to take necessary steps to remedy the mischief as may be permissible under the municipal law. The Court further directed the Municipal Corporation to submit a report of compliance to the court. In pursuance of the said order, the Municipal Corporation carried out the necessary inspection and it noticed erection of additional construction on the property. Accordingly show cause notices were issued under section 351 of M.M.C.Act for the removal of the said structures. In pursuance of the said notices issued under section 351 of the M.M.C.Act read with other sections hearing was given and the impugned order dated 25th August, 2004 has been passed.

4. The learned single Judge declined the ad-interim relief as in his view the suit is not maintainable. He observed in para 3 as follows:

> "In my view, the respondent no.1 had the jurisdiction and authority to issue the

notice under section 351 and also to pass the order. Issuance of a notice was within the jurisdiction. There is distinction between an order which passed without jurisdiction and an order which is erroneous. An erroneous order still binds the parties and cannot be challenged in a collateral proceedings by way of a suit. The impugned order is not challenged by filing of a writ petition and has become final. In the circumstances, the present suit for a declaration that the order is illegal and without jurisdiction is prima facie not maintainable. Hence, no prima facie case for grant of ad-interim relief is made out. Hence, ad-interim relief is declined."

5. The only question is whether the suit of the plaintiff is maintainable. At the very out set we may observe that the jurisdiction of the civil courts is all embracing except to the extent it is excluded by an express provision of law or by clear intendment arising from such law. This is the purport of Section 9 of the Code of Civil Procedure. How section 9 operates is perhaps best illustrated in Secretary of State Vs. Mask & Co.; A.I.R.1940 Privy Council 105 where the court held

that the exclusion of the jurisdiction of the Civil Courts is not to be readily inferred but such exclusion must either be explicitly expressed or clearly implied. Even if jurisdiction is so excluded, the Civil courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

6. In Dhulabhai etc. Vs. State of Madhya Pradesh and another; AIR 1969 S.C.78, Hidayatullah, C.J. speaking for the Bench summarised the legal position as follows:

> "(1) Where the statute gives a finality to the orders of the special tribunals the civil court's jurisdiction must be held to be excluded if there is adequate remedy to do what the civil courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.
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> (2) Where there is an express bar of the

jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.

Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not.

(3) Challenge to the provisions of the particular Act as ultra vires cannot be brought before Tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or

reference from the decision of the Tribunals.

(4) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit.

(5) Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegally collected a suit lies.

(6) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is a relevant enquiry.

(7) An exclusion of the jurisdiction of the

civil court is not readily to be inferred unless the conditions above set down apply.

7. In the light of these conclusions we have to see how the present case stands. Here the challenge is to a notice under section 351 of M.M.C.Act and the order passed thereon which are impugned on the ground of want of jurisdiction, propriety and legality thereof being malafide and issued for parallel purpose de horse the Act. We are unable to see how the present suit would fall under any of the exceptions carved out in Dudhabhai's case. There is nothing in the MMC Act to suggtest that the jurisdiction of the civil courts is expressly or impliedly excluded. Merely because the party has not filed a writ petition does not mean that the notice under sec.351 of M.M.C.Act and the order passed thereon cannot be challenged by way of a suit. In that view of the matter, the appeal will have to be allowed. The impugned order is accordingly set aside. There shall be ad-interim reliefs in terms prayer clauses (a) and (b) pending hearing and final disposal of the notice of motion. Hearing of the notice of motion is expedited. Learned single Judge is requested to dispose of the notice of motion expeditiously, preferably within 3 months.